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In The

Supreme Court of the United States

October Term, 1995

TYRONE BROOKS, *et al.*,

Appellants,

versus

STATE OF GEORGIA,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO AFFIRM

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QUESTIONS PRESENTED

I. Whether the District Court correctly rejected the contention of *amici* that Section 5 of the Voting Rights Act could be construed in a wholly new way that would force the State of Georgia to repeal laws that have been in effect since before Section 5 was adopted?

II. Whether the District Court acted within its discretion in denying Appellants, who were serving merely as *amici curiae*, to intervene for the purpose of pursuing an appeal where the United States itself was a party defendant and could have pursued any appeal that might have been meritorious?

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MOTION TO AFFIRM

The State of Georgia hereby moves this Court to affirm the order and judgment of the three-judge District Court in this case. Appellee respectfully submits that this case is an appropriate one for summary affirmance because the Appellants are attempting to advance theories of the Voting Rights Act that are contrary to the purpose of the Act and which can fairly be described as frivolous. Moreover, Appellants in this Court were not even parties below. They complain, as a threshold to raising the merits issues, that the District Court erred in refusing to allow them to intervene to pursue the instant appeal. Because the District Court was well within its authority in denying intervention, a summary affirmance is especially appropriate here. If probable jurisdiction

were noted in this case, Appellants would be unable at the time of plenary consideration to show that they even had a right to be in this Court.

STATEMENT OF THE CASE

This is an appeal from a declaratory judgment entered under Section 5 of the Voting Rights Act concerning sixty-two Superior Court seats enacted by the Georgia General Assembly since November 1, 1964. *See* 42 U.S.C. § 1973c. Section 5 stipulates that "voting changes" must receive a favorable declaratory judgment if they do not have the "purpose" or "effect" of discriminating. 42 U.S.C. § 1973c. In this regard, the term "effect" has a very special and narrow meaning. Specifically, it refers only to whether a voting change is "retrogressive"; that is, whether the new practice disadvantages minority voters *in comparison to* their position on November 1, 1964. *Beer v. United States,* 425 U.S. 130, 140-41 (1976); *City of Lockhart v. United States,* 460 U.S. 125, 134 (1983); *Holder v. Hall,* 129 L.Ed.2d 687 (1994); *Shaw v. Reno,* 125 L.Ed.2d 511 (1993). In this case, one could not reasonably contend that there has been "retrogression" when new Superior Court judgeships have been added. Each new judgeship was elected just like the pre-existing ones.

Nevertheless, for the first four years of the pendency of this case, the Department of Justice (DOJ) opposed Section 5 preclearance by maintaining that merely adding new judgeships was "retrogressive." On the eve of trial, the government acknowledged that its "retrogression" defense had no merit. Because the "effect" part of Section

5 was removed with the elimination of the retrogression issue, the only remaining element of Section 5 was the "purpose" requirement. In that regard, it was undisputed that each of the judgeships at issue was enacted for only one purpose: to add additional judges in order to meet increasing caseloads.

The DOJ's Administrative Rulings. Before this action was brought by Georgia, preclearance was sought under Section 5 administratively. The DOJ objected to all Superior Court judgeships in those portions of the State where there was a significant black population. In explaining its objection, the DOJ did not suggest that black candidates had been discriminated against in judicial elections, nor did the DOJ suggest that there was any "under-representation" of blacks on the bench *vis-a-vis* the number of eligible lawyers. Rather, the DOJ's objection rested on its displeasure with Georgia's majority vote law. For example, the DOJ's ruling questioned whether the majority vote law was enacted *in 1964* for some racially discriminatory purpose. The government ignored the fact that this law was part of the State's mandatory, state-wide election system *prior to the effective date of Section 5.* The entry of this objection necessitated the filing and trial of this action.

Georgia's Superior Court Judgeships. The Superior Courts of the State of Georgia have been Georgia's trial courts of general jurisdiction since the State was founded over two centuries ago. Superior Courts have plenary civil jurisdiction, and they have sole jurisdiction over equity cases, felony cases, domestic and custody cases, and several other classes of civil cases. They also exercise a wide variety of appellate and certiorari jurisdiction

over inferior tribunals, administrative bodies, and local government bodies. *See* O.C.G.A. § 15-6-8.

As of November 1, 1964, the General Assembly had authorized sixty-one Superior Court judgeships throughout the State. From 1965 through trial, an additional eighty-eight Superior Court judgeships were authorized by the General Assembly.

As of trial, Georgia thus had one hundred fifty-nine Superior Court judgeships authorized by the individual acts of the General Assembly that created those judgeships. Each and every one of the Superior Court seats added since November 1, 1964 was added to a specific Superior Court judicial circuit. There are presently forty-six separate and distinct Superior Court circuits in the State of Georgia. Some circuits in urban areas consist of only one county, while other circuits comprise several counties. Never in the history of the State has any county been split into two or more circuits.

Judicial elections in the State of Georgia have a long tradition. The very first election of judges in the United States took place in this State nearly two centuries ago under the 1812 Georgia Constitution. Ga. Const., Art. III, Sec. IV (1812). *See generally,* Winters, *Selection of Judges – An Historical Introduction,* 44 Tex. L. Rev. 1081, 1082 (1966). While several methods of selecting judges prevailed during the 19th century, Georgia's Superior Court judges have now been elected continuously by the voters for nearly a century.

Candidates for Superior Court judgeships are nominated at primary elections by the voters in each of the respective circuits, just as they have been for the past century. Candidates so nominated are then elected at the November general election. Since the adoption of Georgia's 1983 Constitution, judicial elections have been nonpartisan. *See* Ga. Const., Art. VI, Sec. VII, Par. I.

Superior Court candidates must obtain a majority of the votes in order to win nomination or election. This requirement applies equally to all state and county offices in Georgia. The majority vote requirement represents no change in the State's law since November 1, 1964. The exact same provision was in effect on that date. As such, this practice is not reached by Section 5. *See* 42 U.S.C. § 1973c.

Partly as an adjunct to majority voting, all Superior Court judges – and all other state and county officials throughout Georgia – must be elected pursuant to separate designated places (sometimes called "posts") on the ballot. This practice was codified in the 1964 Election Code and it, too, was effective prior to the November 1, 1964 date with regard to all Superior Court judgeships, as well as other offices. *See* O.C.G.A. § 21-2-135. As a practical matter, of course, this "seat identification requirement" is necessary to effectuate the majority vote requirement. It is mechanically impossible to have a majority vote requirement without also requiring separate and distinct positions.

The Selection of Superior Court Judges in Georgia. To fully appreciate how Georgia's Superior Court and other

high-level judicial officers are selected, one has to consider not only the election procedures but the appointment process as well. When Superior Court judgeships become vacant and when new judgeships are created, those vacancies are filled by gubernatorial appointment. Beginning when Jimmy Carter was elected Governor, a Judicial Nominating Commission (JNC) has screened applicants and made recommendations to the Governor. Since the creation of the JNC, the Governor's appointments have come exclusively from the names recommended by the Commission.

As a practical matter, the great majority of judges have come to the bench by appointment. From 1968 to mid-1994, one hundred fifty-three of the two hundred thirty-three Superior Court judges came to their office by appointment. Of the one hundred forty-five Superior Court judges serving in mid-1994, one hundred came to their office by appointment, or sixty-nine percent.

The Racial Make-Up of Georgia's Bench. An indication of whether there is racial discrimination in the selection and retention of Georgia judges comes from the evidence regarding the appointment and election experience of African-American lawyers as judges. First, however, one must look at the racial composition of the Bar itself, for therein lies the crux of this case. It is at this threshold point that the DOJ's and Appellants' charges of discrimination foundered. The reason why Georgia has fewer black Superior Court judges, percentage-wise, than there are blacks in the general population is simple. It is because the percentage of blacks in the Bar who are eligible to serve as Superior Court judges is much lower than the African-American percentage of the population

at large. The percentage of blacks in the Bar has ranged from one percent in the early 1970's up to the present 4.1 percent for lawyers with the legal minimum of seven years of experience. (Pl. Ex. 93, p. 7 & Tab 2.)

In most of the Superior Court circuits in which judgeships were at issue in this case, the number of African-American attorneys is negligible. Of the thirty judicial circuits in which the DOJ challenged a new judgeship, there are eight that did not have a single eligible black attorney. Of the remaining circuits, there are six which had only a single black attorney. Six others had only two black attorneys. It is these facts that Appellants ignore.

Not only is the racial makeup of the bench in Georgia inconsistent with the contention that there is racial discrimination in the process of selecting and electing judges, the evidence shows that the State has pursued affirmative efforts to bring African-Americans to the bench wherever possible. In those Superior Court circuits where there are just five or more African-American attorneys who satisfy the minimum eligibility requirements, ten of the fifty-seven Superior Court judges were black as of May 15, 1994. That is eighteen percent. (Pl. Ex. 93, p. 9) By comparison, only five percent of the Bar in those eleven circuits is black. (*Id.* at Tab 4) Wherever there has been a realistic opportunity to bring African-Americans to the Superior Court bench in Georgia, it has been done.

Georgia's Experience with the Appointment of African Americans to the Bench. Throughout the history of the JNC, African-American applicants seeking judgeships have fared well. The rate of appointment of African-Americans

has exceeded that of white applicants. Since the first Superior Court appointment through the JNC process in 1972, there have been a total of eight hundred seventy-five lawyers (or judges of other courts) who have sought Superior Court judgeships. Of these eight hundred seventy-five persons, one hundred six have been black. That is twelve percent, which exceeds the percentage of African-American lawyers who have been in the Bar over this time. (Pl. Ex. 93, Tab 2 & 3)

If African-American lawyers were appointed to the one hundred twenty-six Superior Court openings filled by appointment from 1972 to May 15, 1994 in proportion to their *current* numbers in the Bar statewide, there would have been five appointments.[1] If minority lawyers had been appointed in proportion to their rate of application to the JNC, then there would have been eight black appointments. (Pl. Ex. 94, Tab 2) But in fact, since the JNC process has been in effect and up to the time of trial, twelve African-American lawyers were appointed to Superior Court judgeships by the four different governors who served during the time, which amounts to ten percent of all such judgeships appointed. These facts demonstrate that the primary route to the Superior Court bench in Georgia, gubernatorial appointment, is free of discrimination.

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[1] The expected number of black appointments based on the actual numbers of African-American lawyers in each circuit at the time each appointment was made is significantly lower. (Pl. Ex. 94, Tab 2)

Georgia's Judicial Election History and the Experience of African-American Candidates. The importance of appointment as a route to the judiciary in Georgia is underscored by the history of judicial elections in this State. Simply put, incumbent judges are rarely beaten. The election data in this case, which ran from 1968 through May 15, 1994, reflects six hundred twenty-one instances where an incumbent Superior Court judge stood for election. In five hundred thirty of those elections, the incumbent was unopposed. In only ninety instances did they draw opposition, and in only twenty-six, which is four percent of all the elections, were those incumbents defeated. (Pl. Exs. 1 & 93, p. 15)

Black candidates have fared extremely well and comparable to whites in running for election to hold their judicial offices as incumbents. The most dramatic proof of that is in the state-wide races that have been held. There have been four instances where African-American judges have run state-wide for reelection and been opposed by white challengers. In each of these instances, the black incumbent won election state-wide.

This experience with the state-wide races is confirmed by the experience of African-American trial court judges. There have been twenty-eight instances where African-American judges stood for reelection as Superior Court or State Court incumbents. (Pl. Ex. 93, pp. 16-18) In only one instance in the history of the State of Georgia has a black incumbent ever been defeated by a white challenger. That single instance occurred thirteen years ago when a white female judge of the Muscogee County State Court ran against a recently appointed black male Superior Court judge in 1982. In every other instance

where African-American trial court judges have stood for reelection as incumbents, they have prevailed. That is a success rate of 27 out of 28. (Pl. Ex. 93, p. 13)

Open seat elections, where no incumbent is running, comprise a small portion of all of the judicial elections in Georgia. In this category of elections, African-American candidates have again fared well. Of nine instances where black and white judicial candidates opposed one another for an open seat on either the Superior Court or the State Court, a black candidate was successful five times, or fifty-five percent. Moreover, in one of those races, the white candidate received a majority of the votes cast by African-Americans. Hence, one might more accurately describe this pool of events as showing that black candidates won five out of eight of the black-white races – which would discount this one race – or that black candidates and black voters were successful in six out of nine of these elections. (Pl. Ex. 93, Tab 10)

ARGUMENT

I. THE ADDITION OF SUPERIOR COURT JUDGESHIPS IN GEORGIA DOES NOT VIOLATE SECTION 5.

A. Appellants' Effort to Force the Repeal of Laws in Effect Prior to the Passage of Section 5 is Unauthorized.

The Appellants' Section 5 theory is foreign to the law. As a *quid pro quo* for obtaining a new judgeship, Appellants would attach a price, that price being the repeal of

statutes that are beyond the scope of Section 5 because they were in effect prior to November 1, 1964.

Section 5 was not designed to permit review of electoral practices of a State that were in effect prior to the Act's adoption. Section 5 was enacted primarily as a complement to the 1965 Voting Rights Act suspension of literacy tests. Because Congress believed that the elimination of these tests would lead to registration of new minority voters, Section 5 was included to ensure that no changes in the laws of covered jurisdictions would be implemented that would undercut the voter registration gains achieved by the literacy test ban. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). This underlying purpose of Section 5 was discussed long ago in *Beer v. United States*, 425 U.S. 130, 140-41 (1976):

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent states from "undo[ing] or "defeat[ing] the rights recently won" by Negroes. H.R. Rep. No. 91-397, p. 8. Section 5 was intended "to ensure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, p. 19.

Because of the narrow mission of Section 5, this Court has rejected the idea that it provides *carte blanche* authority, for either the DOJ or a preclearance court, to determine whether any electoral practice of a covered jurisdiction is free from possible discrimination. *City of*

Lockhart v. United States, 460 U.S. 125 (1983). Claims of that sort must be brought, where warranted, by the traditional route of a civil action filed in the jurisdiction of the defendant, and with the challenging party – be that the United States or a private person – bearing the normal burden of proving illegal discrimination.

The *Beer v. United States* rule was followed in *City of Lockhart v. United States*, 460 U.S. 125 (1983), which involved a change by Lockhart, Texas from a "general law" city government to a home-rule city council and mayor. Under the new home-rule system, the mayor and two councilpersons were elected in even numbered years using separate numbered posts. This Court accepted the contention that eliminating numbered-post elections might benefit minority voters, but even if true, that was irrelevant since numbered posts had been used under the prior method of electing the city government, and they were in use on the effective date of the Voting Rights Act. 460 U.S. at 135. The limited reach of Section 5 is succinctly stated in the following quotations from *Lockhart*:

> Although there may have been no improvement in [minority] voting strength, there has been no retrogression either. 460 U.S. at 135.
>
> Since the new plan did not increase the degree of discrimination against blacks, it was entitled to § 5 preclearance. 460 U.S. at 134.

There is also this Court's decision in *Holder v. Hall*, 129 L.Ed.2d 687 (1994), where Justice Kennedy discussed the respective roles of Sections 2 and 5 of the Voting Rights Act in his opinion.

To be sure, if the structure and purpose of § 2 mirrored that of § 5, then the case for interpreting §§ 2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application. Section 5 applies only in certain jurisdictions specified by Congress and "only to proposed changes in voting procedures." *Beer v. United States*, 425 U.S. 130, 138 (1976); *see* 42 U.S.C. § 1973b(b) (specifying jurisdictions where § 5 applies). In those covered jurisdictions, a proposed change in a voting practice must be approved in advance by the Attorney General or the federal courts. § 1973c. *The purpose of this requirement "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."* 425 U.S. at 141. *Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change. See id.*, at 141. The baseline for comparison is present by definition; it is the existing status. While there may be difficulty in determining whether a proposed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur. *See* 28 C.F.R. § 51.54(b) (1993) (emphasis added; footnote omitted).

B. Appellants' Attempt To Circumvent Section 5's Nonretrogression Rule Would Re-Write That Law.

The District Court correctly applied the *Beer-Lockhart-Holder* interpretation of Section 5. Because the method of

electing Georgia's new judges is precisely the same as it was for pre-existing judgeships, the Section 5 "benchmark" for the election of Superior Court seats is election by all the voters in the circuit and by majority vote. This is the uniform law of the State consistent with statutes of state-wide application that were in effect on November 1, 1964. The only change at issue here, the addition of additional seats, caused no change whatsoever from the benchmark election practices. This case falls squarely within the *Lockhart* decision.

While the Appellants here selectively criticize the State's practices relating to majority voting and circuit-wide elections, they would be equally empowered, under their theory, to insist that Georgia change any other practice that is used in the election of new judgeships, even though that practice was a part of the State's mandatory, state-wide laws on November 1, 1964. Under their theory, for example, the DOJ could force the State of Georgia – as a condition to increasing its judiciary – to strike from its Constitution the requirement that Superior Court judges be members of the Bar for seven years as a "candidate qualification" that has a discriminatory impact. The State could be equally forced, as a prerequisite to adding a new Superior Court judgeship, to expand its voter registration procedures, or even to require postcard registration; to extend the hours of election when its polling places are open, or even to shorten them if the Attorney General believed that that was advantageous to black voters; to expand the number of polling places, to reduce them, or simply to move them around to other locations if the Attorney General concluded that that might advance the interest of black voters; or to modify any of the other

hundreds of practices that are prescribed by the State's election laws, *see* O.C.G.A. Title 21. These are "voting practices" that are just as much a part of judicial elections as are those practices that Appellants and the DOJ arbitrarily chose to attack.

No one could rationally argue that Congress contemplated that either the Attorney General or a Section 5 district court have such extraordinary powers, but that is exactly what the Appellants claim.

C. Georgia's New Judgeships Are Not Objectionable Because Of Some Claimed "Purpose To Discriminate."

Since there has been no retrogression in this case, that should be the end of the inquiry under the *Beer-Lockhart-Holder* rulings. If some kind of a purpose inquiry were also appropriate in this case, however, it would be completely different than what the Appellants suggest. Appellants contend that the statutes here can be vetoed as purposefully discriminatory because the State discriminated when: (1) the General Assembly enacted allegedly discriminatory laws before November 1, 1964; (2) the General Assembly failed to repeal those laws later; or (3) the General Assembly failed to enact other laws that would have changed the way in which Superior Court judges are elected in Georgia. These theories of "purposeful discrimination" bear no relationship to this Court's past rulings.

A statute is not "purposefully discriminatory" unless the underlying, motivating purpose behind the specific law was a discriminatory one. *Hunter v. Underwood*, 471

U.S. 222 (1985); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Jefferson v. Hackney*, 406 U.S. 535 (1972). It is not enough, for example, that a statute's discriminatory consequences may have been foreseen at the time of enactment. Discriminatory purpose occurs only if a statute was enacted *because of* discriminatory motive, and only if the statute would not have been enacted *but for* that motive. *Personnel Administrator of Massachusetts v. Feeney, supra*, at 279. Even where discrimination was a motive, *illegal* discrimination does not arise if the State would have adopted the statute regardless of the tainted motive. *See generally Mount Healthy School District v. Doyle*, 429 U.S. 274 (1977); *Hunter v. Underwood*, 471 U.S. 222 (1985).

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case the State legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse affects upon an identifiable group. *Personnel Administrator of Massachusetts v. Feeney, supra*, at 279.

D. None Of The Enactments At Issue In This Case Were Motivated In The Slightest Part By Racial Discrimination.

Appellants avoid the real purpose behind these enactments because race had nothing whatsoever to do with them. All of these statutes did one thing, and one thing only – they added seats to the various Superior

Court circuits. None of the statutes affected the method of electing those seats once created, and race played no role whatsoever in adopting these statutes. This was the undisputed testimony of present and past federal judges, state judges, state legislators, and personnel from the Administrative Office of the Courts, all of whom were personally involved in one way or another in the evaluation, recommendation, and enactment of these laws over the past 30 years. The sole purpose was to add judges to meet the courts' increasing caseloads.

E. The Convoluted Arguments Of The Appellants Are Illustrated By Their Attempt To Make Georgia's 1964 Majority Vote Law A Central Theme Of Their Case.

The actual evidence concerning the purpose behind the adoption of Georgia's 1964 majority vote law is radically different than what Appellants present in their Jurisdictional Statement. How Georgia's present majority vote law came to be enacted was described in detail by the persons who were most active in its adoption. These witnesses included former Governor Carl Sanders, former Speaker of the House and later Georgia Supreme Court Justice George T. Smith, former Senator and Administration Floor Leader Milton Carlton, and Melba Williams, a past Democratic National Committeeperson and an active member of Governor Sanders' Election Law Study Committee. In brief, the law was one small provision in a massive new Election Code, the first comprehensive Election Code Georgia had ever had. Prior to then, the State's laws were confusing, to the extent there was law at all. Before the 1964 Code, the political parties had

nearly complete control over all aspects of the primary elections, including the actual dates of the elections, when there would be qualifying, qualifying fees, whether a majority vote would be required to win, etc. Some counties used majority vote rules and others allowed their nominees to be elected by a plurality vote. That practice might change from election to election based on the whims – and self interest – of the local political executive committee members. Wholly independent of any question of race, the authority of the local committees was abused to the detriment of the public and the voters.

It is in this context that the majority vote law that Appellants complain about was adopted. The General Assembly had to make a choice, since it was certain that there was going to be one uniform rule, and that choice was whether to have plurality voting everywhere or to have majority voting everywhere. Given the experience with plurality voting manipulation by the courthouse crowds in many of the rural counties, and given that majority vote requirements had worked fine where they were used, the choice was simple. The State rejected plurality voting, and it could not reasonably have done otherwise given Georgia's experience with both voting systems, plurality and majority.

As a matter of fact, Appellants' contentions regarding majority voting are misplaced. As a matter of law, those contentions have nothing to do with the Section 5 issues in this case.

II. INTERVENTION WAS PROPERLY DENIED IN THIS CASE.

A. Appellants Are Unable To Point To A Single Fact Or Issue That Was Not Adequately Addressed By The United States.

In exercising its discretion in passing on an application for intervention, a crucial question is whether the interests of the movants are adequately protected by parties to the case. In their 1990 and 1991 motions to intervene, Appellants suggested that the United States might not adequately represent their interests. Now, after years of litigation and a full trial, Appellants still can point to no remotely meritorious legal or factual issue that the United States left untouched. To the contrary, if any criticism were to be levied at the United States for its defense of Georgia's claims, one could suggest that the government raised far too many legal and factual contentions, some of which were plainly beyond what could be characterized as reasonable positions.

B. The Statutory Claims Involved In This Case Are Uniquely Inappropriate For Private Intervention.

Equally important in determining whether intervention may or may not be appropriate in a given case is the nature of the claims that are before the court. That factor weighs heavily against intervention here.

This case arises solely under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. That statute, by its express terms, makes the issues before the District Court

the exclusive concern of the State of Georgia and the United States. Section 5 represents the most significant intrusion into the sovereignty of state government that has occurred this century. It divests southern states (and portions of some other states) of the right to regulate their own election affairs without the prior approval of either the DOJ or the District of Columbia District Court. Whether such approval should be forthcoming or not is a matter over which private parties have no statutory role whatsoever.

This Court has made it clear that the unique nature of Section 5 proceedings makes them especially ill-suited for participation by private parties. In *Morris v. Gresette*, 432 U.S. 491 (1977), the Court held that the Attorney General's failure to interpose a timely objection under Section 5 was absolutely immune from subsequent review in an action brought by private parties. The Court based its conclusion on a variety of considerations, which included the extraordinarily harsh nature of Section 5; the importance of allowing covered jurisdictions expeditious treatment of their claims; the fact that no party's right to challenge electoral practices is precluded by Section 5 preclearance; and the fact that the Attorney General has a unique power under Section 5. 432 U.S. at 501-07.

While *Morris v. Gresette* involved a different issue than the present case, Georgia believes that the reasoning behind the *Morris* decision is very instructive. Indeed, the Appellants' position is fundamentally at odds with this Court's reasoning in *Morris*. They contend that they might be better able to protect the interests of black voters than the United States Department of Justice, notwithstanding the fact that the DOJ has a congressional

mandate to do just that. Appellants' assertions are belied by the extensive record in this case.

Moreover, since the Attorney General has the absolute authority to preclear any electoral change, Appellants' suggestion that they should be allowed to take a position different than the government's is especially inappropriate in a Section 5 case. This is particularly true where the intervenors seek to assert a right of appeal that has been abandoned by the United States.

When the United States decides not to appeal an adverse Section 5 judgment, or to abandon such an appeal, that is tantamount to allowing Section 5 preclearance. *Since the DOJ has plenary power to grant Section 5 approval of any election change, to allow intervention for the purpose of pursuing appeals contrary to the decision of the DOJ would effect a wholesale rewriting of Section 5.* Intervention for that purpose would transfer the Section 5 approval power from the Attorney General to private parties, contrary to the express terms of the statute. *See* 42 U.S.C. § 1973c.

C. All Claims The Appellants Might Have Are Preserved Without An Appeal In This Case.

While private parties have no role in the Section 5 approval and decision-making process, they do have a right to bring an action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Under Section 2, they may challenge any of the statutes at issue in this case if they still contend that they are racially discriminatory in their purpose or result. The right to bring such an action

remains unimpaired by the decision of the District Court. Section 5 is explicit in that regard. It states:

> Neither an affirmative indication by the Attorney General that no objection would be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. 42 U.S.C. § 1973c.

Thus, movants were not prejudiced in any way when intervention was denied.

D. The Motion To Intervene Was Untimely And Was Properly Denied For That Reason.

Thirty days elapsed from the District Court's entry of final judgment until the motion to intervene was filed. The motion was filed on the very last day in which a notice of appeal might be filed. The purported notice of appeal attached to the motion to intervene was ineffective since at the time it was filed movants were not parties with any right to appeal. They were simply *amici* who, as such, had no standing to appeal. *United States v. Oregon*, 913 F.2d 576, 589-90 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991); *Moten v. Bricklayers Int. Union*, 543 F.2d 224, 227 (D.C. Cir. 1976). Appellants' attempt to appeal the District Court's judgment was untimely.

CONCLUSION

For the foregoing reasons, the State of Georgia respectfully requests that the judgment of the District Court be summarily affirmed.

Respectfully submitted,

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